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From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley

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Since its adoption in the wake of corporate scandals at Enron, WorldCom, and Global Crossing, among other major corporations, the Sarbanes-Oxley Act of 2002[1] has been the subject of heated criticism. If anything, the intensity of such attacks has grown over time. Critics have targeted both the merits of the legislation and procedural issues surrounding it. Most universal, however, has been the dismissal of the Act for its "federalization" of corporate law. Judging by the literature, every critic would seem to concur on this flaw.

For the most part, however, this seemingly jurisdictional critique is simply asserted, without close elaboration. More troubling, this argument distinguishes itself from assertions of the merits and process failings of the Act, which are capable of correction. If Sarbanes-Oxley is flawed because it "federalizes" corporate law, however, there is no marginal adjustment to be made. Rather, the legislation should simply be repealed.

Analysis of the expectations behind this critique is therefore well-warranted. What are the shortcomings that critics of Sarbanes-Oxley's "federalization" of corporate law hope to capture? I begin by considering and putting to one side a series of meanings that follow most naturally from the language of "federalization"—doctrinal claims about the

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1. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18 U.S.C.).

appropriate content of corporate law, arguments for federalism in its more "originalist" senses, and assertions of the benefits of competition in corporate law. Instead, I conclude, criticism of Sarbanes-Oxley's "federalization" of corporate law ultimately reduces to the familiar, if no less valid, argument that presumptively efficient markets should not be constrained by public regulation—here, Sarbanes-Oxley's mandatory rules of corporate governance. Although couched in the more palatable—and perhaps more effective—rhetoric of federal jurisdiction-stripping, the real trouble with Sarbanes-Oxley is its imposition of public regulation where private incentives and the market have previously held sway.

Once we acknowledge as much, it becomes clear that some distinct verbiage is in order. Seeking to place critiques of the Act in the best light possible, I offer the conception of Sarbanes-Oxley's corporate governance rules as incidents of "nationalization." Such a notion, I would argue, effectively captures the political economy at work: the familiar institutional competition between regulation and the market. This choice of term is also appealing, given its resonance with the commitment of many of Sarbanes-Oxley's critics to a converse "privatization" of federal securities law. As in many a transitional state, in the conception I propose, regulation of the modern public corporation faces simultaneous pressures toward privatization on the one hand, and nationalization on the other.

If this is the dynamic at work in the regulation of corporate governance, how is the balance of nationalization and privatization to play out? In the face of conflicting demands of the public and private, recent years have seen growing advocacy of a "third way" in macroeconomic policy. Such a regime of mixed governance, I will suggest, may have utility in the regulation of corporate governance as well. A pattern of "jurisdictional redundancy"—shared federal and state jurisdiction over corporate governance—may thus be a valuable source of innovation and change in corporate law. Appropriately constrained, a federal role in corporate governance may be not only permissible, but advisable.

This essay proceeds as follows: After reviewing the adoption and the corporate governance provisions of the Sarbanes-Oxley Act, I take up various potential implications of a "federalization" critique in Part II, concluding the latter to be a stand-in for criticisms of regulatory intervention in the market of corporate governance. With the latter in mind, Part III offers "nationalization" as a more appropriate appellation of the dynamic at work. Finally, in Part IV, I offer the preliminary outlines of an argument for "mixed governance" in corporate law, suggesting the utility of jurisdictional redundancy in corporate regulation.

I. SARBANES-OXLEY AND THE REGULATION OF CORPORATE GOVERNANCE

In June 2002, faced with corporate scandals, stock market decline, and an impending midterm election, Congress adopted the Sarbanes-Oxley Act of 2002.[2] Over the preceding year, the spectacular crash of Enron, WorldCom, Global Crossing, and other companies had brought widespread attention to deceptive business practices at the nation's largest corporations. In the fall of 2001, Enron, once the seventh largest firm in the country, revealed itself to be a largely empty shell, propped up by gross incidents of financial manipulation.[3] Among other malfeasances, Enron had repeatedly inflated its stock through derivatives trading and transactions with special-purpose entities designed purely to create the illusion of rapidly increasing earnings.[4] After the company restated its accounts in October 2001, to reflect $618 million in third quarter losses and a $1.2 billion reduction in shareholder equity, the firm quickly collapsed.[5]

Rather than an isolated incident, Enron's demise coincided with a string of other cases of corporate fraud,

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2. *Id.*

3. *See* Leslie Wayne, *Before Debacle, Enron Insiders Cashed in $1.1 Billion in Shares*, N.Y. TIMES, Jan. 13, 2002, at A1. For a more thorough description of the collapse of Enron, see William W. Bratton, *Does Corporate Law Protect The Interests Of Shareholders and Other Stakeholders?: Enron And The Dark Side Of Shareholder Value*, 76 TUL. L. REV. 1275 (2002). *See also* Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 4-7 (2002).

4. *See* Ribstein, *supra* note 3, at 4.

5. *See* Kurt Eichenwald, *Enron's Collapse: Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, §1, at 1.

provoking demands for a federal response.[6] An apparent crisis situation and media frenzy around it encouraged legislators to call a series of hearings on the corporate scandals.[7] After an initial flurry of activity, however, the reform proposals appeared to stall, with some contending that "Enron's moment as a galvanizing issue ha[d] passed."[8] In June 2002, however, the Securities and Exchange Commission filed charges against WorldCom, alleging that it had uncovered more than $9 billion in questionable accounting.[9] The new scandal, combined with an economic downturn and Republican Party concerns that a delay in enacting corporate reforms could hurt it in the November 2002 midterm elections, pushed the Act to an easy legislative victory.[10]

The brief congressional debate over the Sarbanes-Oxley Act only cursorily addressed issues of corporate governance.[11] Much of the Act concerns securities regulation and the oversight of auditors. In this spirit, the legislation increases disclosure requirements for off-balance-sheet transactions and mandates the creation of a public board to oversee auditors.[12]

However, the Act also expands federal regulation of corporate governance. Section 301 of the Act requires listed companies to utilize audit committees composed entirely of independent directors.[13] Section 201 of the Act prohibits

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6. For a discussion of several pre-Enron frauds, see Richard C. Sauer, *Financial Statement Fraud: The Boundaries of Liability Under the Federal Securities Laws*, 57 BUS. L. 955 (2002). For a discussion of the public outcry over Enron and other corporate scandals, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 114 YALE L.J. 1521, 1557-58 (2005).

7. *See* Romano, *supra* note 6, at 1557.

8. *See* Stephen Labaton & Richard A. Oppel, Jr., *Enthusiasm Waning in Congress for Tougher Post-Enron Controls,* N.Y. TIMES, June 10, 2002, at A1.

9. *See* Christopher Stern, *SEC Case Against WorldCom Grows: Agency Alters Charges, Says Telecom Firm's Fraudulent Accounting Could Exceed $9 Billion,* WASH. POST., Nov. 6, 2002, at E1.

10. *See* Romano, *supra* note 6, at 1528.

11. *See id.* at 1549-51.

12. *See* § 401(a), 15 U.S.C. § 78m(j) (Supp. II 2002) (disclosure requirements); § 101, 15 U.S.C. § 7211 (Supp. II 2002).

13. *See* § 301, 15 U.S.C. § 78j-1(m) (Supp. II 2002).

accounting firms from providing an enumerated list of non-audit services to firms that they audit.[14] Sarbanes-Oxley further prohibits corporations from extending credit to executive officers or directors, with limited exceptions.[15] Additionally, both the CEO and CFO of the firm must certify that the company's periodic reports fairly present the firm's financial condition.[16] Finally, and perhaps keyed to the latter, in the event of a material restatement of the company's financial statements, any bonus, incentive, or equity compensation paid to the CEO or CFO must be forfeited.[17] It is these rules of corporate governance that are the subject of interest herein.

II. AGAINST THE FEDERALIZATION OF CORPORATE LAW

For all the rhetoric and ambition surrounding its adoption, the Sarbanes-Oxley Act has been battered by criticism from its inception. If anything, such attacks have grown in intensity over time. Three types of criticism stand out: Some have criticized the Act on the merits. Others have questioned issues of process surrounding the legislation. Most universal, however, has been the critique of Sarbanes-Oxley for its "federalization" of corporate law. After briefly reviewing the merits and process critiques of the Act, it is this final, seemingly "jurisdictional" objection I hope to dissect herein.

As to the merits, two criticisms deserve acknowledgement. Most common is the asserted disconnect between Sarbanes-Oxley's purported ends and enumerated means. The rhetoric surrounding adoption of the Sarbanes-Oxley Act framed it as a response to the corporate scandals of 2001-2002.[18] Yet it is not clear that the Act's corporate governance provisions—its requirement of independent audit committees, its restrictions on corporations' purchase of non-audit services from their auditors, its prohibition of

14. *See* § 201(a), 15 U.S.C. § 78j-1(g) (Supp. II 2002).

15. *See* § 402(a), 15 U.S.C. § 78m(k) (Supp. II 2002).

16. *See* § 302(a), 15 U.S.C. § 7241 (Supp II. 2002).

17. *See* § 304(a), 15 U.S.C. § 7243 (Supp. II 2002). My enumeration of the corporate governance provisions of the Sarbanes-Oxley Act is borrowed from Roberta Romano. *See* Romano, *supra* note 6, at 1527.

18. *See, e.g.*, 148 CONG. REC. H5462 (2002) (remarks of Congressman Oxley).

corporate loans to officers, and its requirements of executive certification of financial statements and of executive forfeiture of bonuses and other incentives in the event of a material restatement—will actually impact the sources of those scandals. Aggressive financial management by corporate executives undoubtedly played a role in the collapse of Enron, WorldCom, Global Crossing, and other corporations.[19] At least in part, the scandals also derived from the inherent ambiguity of accounting obligations in the modern business corporation.[20] The widespread use of financial derivatives[21] and cognitive failures in small group decision-making[22] are also among the likely sources.

Yet Sarbanes-Oxley did little or nothing to address these issues.[23] A restriction on the source of audit services and a prohibition on corporate loans, whatever their merits, arguably do not speak to any of the sources of the Enron, WorldCom, Global Crossing, or other corporate scandals. More broadly, one might question whether any *regulatory* change could address the pattern of increasingly aggressive management of U.S. public corporations.[24] The inherent challenges of effective corporate accounting and the perhaps related under-regulation of derivative instruments also remain unaddressed.[25] For this group of critics, then, the

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19. *See* Larry E. Ribstein, *Sarbox: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279, 284. It bears recalling, however, that Enron was often held up as a model of corporate governance in the years preceding its collapse.

20. *See* David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 88-89 (2003); *see also* Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 5, Mar. 27, 2005 (NELLCO Legal Scholarship Repository, Working Paper), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1018&context=nyu/lewp.

21. *See* Frank Partnoy, *A Revisionist View of Enron and the Sudden Death of "May"*, 48 VILL. L. REV. 1245 (2003).

22. *See* E. Beecher-Monas, *Corporate Governance in the Wake of Enron: An Examination of the Audit Committee Solution to Corporate Fraud*, 55 ADMIN. L. REV. 357 (2003).

23. *See generally* Romano, *supra* note 6; David A. Westbrook, *Telling All: The Sarbanes-Oxley Act and the Ideal of Transparency*, 2004 MICH. ST. L. REV. 441, 445.

24. *See* Ribstein, *supra* note 19, at 284.

25. Questioning the existence of any linkage between the sources of the Enron, WorldCom, Global Crossing, and other scandals and Sarbanes-Oxley's legislative mandates, Roberta Romano notes the citation of those scandals in

Sarbanes-Oxley Act's regulatory mandates do not survive a basic ends-means test. The Act's legislated means are not aligned with its asserted ends.[26]

A distinct argument on the merits speaks not to the *efficacy* of the Act's provisions, but to their wisdom. In this critique, the costs of Sarbanes-Oxley (grossly) outweigh its asserted benefits. This argument has most commonly been proffered with reference to the legislation's reporting and certification requirements.[27] The latter has been of particular concern with smaller corporations, moreover, for whom Sarbanes-Oxley compliance has come to represent a significant and growing share of administrative costs.[28]

As to Sarbanes-Oxley's corporate governance provisions in particular, Roberta Romano has analyzed available empirical evidence regarding the utility of each provision. In each case, she concludes the benefits are limited, at best.[29] As to costs, meanwhile, problematic examples readily present themselves. The prohibition on loans to officers, for example, discourages preferred compensation mechanisms, replacing them with less efficient means to achieve comparable payouts.[30] The exclusion of non-audit

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the legislative advocacy of campaign finance reform, notwithstanding the absence of *any* claim that the corporate misconduct at issue in those cases had anything to do with campaign contributions. *See* Romano, *supra* note 6, at 1526.

26. Some would go further, to argue that certain provisions may actually aggravate the problems that triggered Enron et al. *See, e.g.*, Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269, 337-38 (2003) (suggesting constraints on non-audit services may leave independent auditing under-funded).

27. *See* Romano, *supra* note 6, at 1587-89.

28. *See id.* at 1588-89. Bill Carney attempts to quantify these costs in the growing pattern of "going private" transactions. *See* William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private"*, 55 EMORY L.J. (forthcoming 2005), (Emory Law & Econ. Research Paper No. 05-4, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=672761. In going private, public corporations sacrifice liquidity, but are also freed from their obligations under Sarbanes-Oxley and the securities laws generally.

29. *See* Romano, *supra* note 6, at 1529-43; *see also* Larry E. Ribstein, *Sarbanes-Oxley after Three Years* (Univ. of Ill. Law & Econ. Research Paper No. LE05-016, 2005), *available at* http://papers.ssrn.com/sol13/papers.cfm?abstract_id=746884.

30. *See* M. Todd Henderson & James C. Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption* GEO. L.J. (forthcoming 2005), *available at* http://papers.ssrn.com/sol13/papers.cfm?abstract_id=597661; Romano, *supra* note 6, at 1538-39.

services, meanwhile, may reduce funding for independent auditing and increase the cost of auditing services for significant numbers of corporations.[31] The certification requirement, finally, gives rise to massive compliance costs,[32] and may reduce optimal participation in the capital markets.[33]

Aside from the merits, two process criticisms of Sarbanes-Oxley also deserve note. The first speaks to the legislative process behind the Act's adoption, and the second to the agency delegation attendant to the Act.

Roberta Romano has sharply criticized the Sarbanes-Oxley Act as a case of "emergency legislation"—what she characterizes as legislation adopted in the face of high discount rates among legislators.[34] Given the latter, she posits, legislative attention is necessarily diminished, debate is limited, and opportunities for interest group influence are enhanced. The Sarbanes-Oxley Act, with the frenetic media coverage of Enron, WorldCom, Global Crossing, Adelphia, Tyco, and other spectacular corporate implosions, and the ensuing abandonment of any meaningful political resistance to the legislation, is a classic case of emergency legislation.

In Romano's view, such legislation should be subject to some—at least mild—presumption of error. As a result of its accelerated review and adoption, such legislation poses significantly greater risks of both honest mistakes and special interest abuse. Given these risks, Romano proposes the inclusion of legislative sunsets in emergency legislation, and their incorporation into Sarbanes-Oxley.[35]

The second procedural critique of Sarbanes-Oxley echoes concerns of a longer pedigree. Many have criticized the Act's delegation to the Securities and Exchange Commission of rule-making authority for its corporate gov-

31. *See* Choi & Fisch, *supra* note 26, at 337-38.

32. *See* Romano, *supra* note 6, at 1543 n.61.

33. *See* Carney, *supra* note 28.

34. *See* Romano, *supra* note 6, at 1557.

35. *See id.* at 1600.

ernance provisions.[36] The Commission, the argument goes, has long been prone to regulatory overreaching.[37] It can therefore be expected to use the Act's specific warrants to pursue more general incursions into corporate governance.[38] Limited (or at least narrower) delegations would thus have been preferable.

This is intertwined with many critics' sense of the Act's corporate governance rules as a fruition of the SEC's longstanding agenda to insert itself into corporate governance. Such critics flag the Commission's history of efforts to impose, by administrative fiat, some of the same provisions ultimately incorporated into Sarbanes-Oxley.[39] More generally, they point to the aforementioned pattern of SEC attempts, some successful and others not, to regulate corporate governance.

Of course, the Sarbanes-Oxley Act, a *legislative* intervention into corporate law, is not prone to criticism as regulatory overreaching. Yet the spirit of that argument would seem to persist in critiques of the Act. Even though Sarbanes-Oxley is not itself overreaching, it is likely—in the hands of an aggressively competitive and rent-seeking federal regulatory agency—to *invite* such over-reaching.

Whatever their wisdom or shortcomings, it is not my goal to pass judgment on these critiques; the Sarbanes-Oxley Act may well be fatally flawed on one or more of the above grounds. Instead, I take up an argument on which all of the Act's critics would appear to agree. Seeming to challenge the Act on jurisdictional grounds of a sort, no criticism of Sarbanes-Oxley would appear to be complete without a dismissal of the Act for its "federalization of corporate law."

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36. *See* Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79 (2005).

37. *Cf.* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 28-29 (2003).

38. *Cf.* John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 877-78 (1994); David Jonathan White, *Rulemaking Under Section 14(e) of the Exchange Act*, 36 VAND. L. REV. 1313, 1348-49 (1983).

39. *See* Karmel, *supra* note 36, at 86-91; Romano, *supra* note 6, at 1534, 1541.

Notably, this argument is different in kind from each of the foregoing claims. Each critique of Sarbanes-Oxley on the merits or process goes to specific features in the design or adoption of the legislation, which might—at least theoretically—be subject to amendment or adjustment. As to each of these criticisms, Congress *could* have gotten it right. The "federalization" critique, by contrast, permits no such response. It is a conversation-stopper. The problem is not *how* the Act "federalizes" corporate law, nor the *extent* to which it does so; rather, it is the fact that it does so at all. Widespread and dispositive as it appears, this jurisdictional-sounding argument deserves our attention. What precisely do the myriad authors of this critique mean to criticize? More precisely, is it really "federalization" to which they object? In assessing as much, we may better appreciate what is at stake, and perhaps open the door to distinct approaches to reconciliation.[40]

To begin with, the critique of Sarbanes-Oxley for its federalization of corporate law might be seen to rest on some doctrinal segregation of state corporate law and federal securities regulation. The Act's corporate law provisions are flawed, in this view, because they overstep a line in the sand—a supra-legislative internal affairs doctrine—marking the legitimate content of corporate law versus securities regulation. If corporate and securities law enjoy some consistently divergent content, Congress's extension of federal mandates from securities law to the inherently distinct realm of corporate law might arguably be illegitimate, or at least unwise.

Emanations of this view might be perceived in forceful talk of disclosure as the appropriate domain of federal securities law, as opposed to the corporate governance rules incorporated in the Sarbanes-Oxley Act. To similar effect is the reference to federal rules as oriented to process rather than substance. Finally, talk of Sarbanes-Oxley's "inconsis-

40. Talk of Sarbanes-Oxley's "federalization" of corporate law might—distinctly from the analysis I offer—also be criticized for its sweeping tenor. After Sarbanes-Oxley, such rhetoric would seem to imply, *all* corporate law is federal. Unless those who invoke the language of "federalization" conceive of corporate law as an integrated unit, any part of which subsumes the whole, Sarbanes-Oxley must be acknowledged to federalize only limited aspects of corporate law.

tency" with the internal affairs doctrine is in a similar spirit.[41]

Insofar as critics of Sarbanes-Oxley's "federalization" of corporate law mean to explicitly or implicitly invoke some doctrinal barrier to Sarbanes-Oxley's corporate governance provisions, they must fall short. No line of sufficient impermeability to categorically exclude any and all possible federal interventions into corporate law can be identified.[42] Some traditional orientation of federal law to the regulation of securities issuances, disclosure, and secondary trading, and of state law to corporate governance, is beyond dispute. But tradition alone, without doctrinal foundation, cannot support a categorical (or jurisdictional) challenge to Sarbanes-Oxley's corporate governance mandates.[43]

By way of doctrinal segregation, however, two lines of argument might potentially be offered. Most significant has been the effort to characterize corporate law as *private* in nature, in contrast with *public* securities law. In the alternative, some have sought to define corporate law as the regulation of *substance*, while securities law is directed to *process*. These possibilities can be considered in turn.

As suggested by Amir Licht, corporate law undoubtedly exhibits features favoring its classification as private law.[44] Over the course of the twentieth century, conceptions of business corporations as public rather than private in nature gradually fell by the wayside. Although controversial at first, this private classification has become increasingly settled, including through the advent of federal securities law and its more direct association (than corporate law) with the protection of public investors.

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41. *Cf.* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 590, 596-97 (2003).

42. *See* Patrick Moyer, *The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States*, 55 U. TOR. FAC. L. REV. 43, 46-58 (1997). In proposing extension of corporate law's market-model to securities law, of course, Roberta Romano and other advocates of issuer choice implicitly or explicitly rely on the absence of any difference in kind between the two fields. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

43. Arguably, invocation of the internal affairs "doctrine" in criticisms of the Sarbanes-Oxley Act bespeaks some such appeal to tradition.

44. *See* Amir N. Licht, *Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation*, 41 VA. J. INT'L L. 583, 610-12 (2001).

Modern theories of the firm, as a "nexus of contracts," have further solidified the classification of corporations as private in nature, and of corporate law as private law.

Other indicia of the private nature of corporate law can also be identified. Corporate law, like other forms of private law (and by contrast with securities regulation), is almost exclusively a product of primary legislation. Further, the enforcement of corporate law is ordinarily retrospective, and plays out in judicial proceedings, rather than through prospective administrative procedures. Finally, the enabling character of corporate law also favors its classification as private law; securities regulation, in contrast, is largely mandatory.[45]

On the other hand, at least *some* indications point to at least *some* public dimension in corporate law. This begins with the original conception of business corporations as public in nature.[46] While the latter has been displaced as the conventional wisdom, recent years have begun to see some challenge to the nexus of contracts and a reassertion of public dimensions of the modern corporation.[47] Bert Westbrook, for example, has drawn on the collapse of Enron to offer a conception of corporate law as policing not the relationship between managers and shareholders, but the emphatically *public* bound between both the latter and former, as "owners," and the wider world of "non-owners."[48] Even more broadly, it has been posited that the private is the necessary medium of the public in the market-driven state.[49]

The ambiguity in corporate law's public character is confirmed by the important "private" features of securities law.[50] Even more telling may be the array of pre-Sarbanes-Oxley federal, mandatory, and hence public interjections

45. *See id.* at 610-15. As to each of these features, of course, the converse is true with reference to securities law, favoring the generalized conception of the latter as public law. *See id.*

46. Berle and Means' seminal work on corporate governance, in fact, pressed a public conception of the firm. *See id.* at 611.

47. *See infra* notes 97-100 and accompanying text.

48. *See* Westbrook, *supra* note 20, at 108-10.

49. The general sustainability of the public-private distinction, as this implies, has been subject to question in recent years.

50. *See* Licht, *supra* note 44, at 607-15.

into corporate governance, including the proxy rules' implications for corporate voting, the regulation of fundamental changes in corporate structure, and the prohibition against insider trading.[51] Given this succession of interventions, it is impossible to argue that the "public" rules of the securities regulation regime have had nothing to say about the "private" law of corporate governance.

The aforementioned public elements of, and public interventions in, corporate law do not undermine the generally private character of corporate law. Yet they do undermine assertions of the *exclusively* private character of corporate law. A categorical rejection of *any* public intervention into corporate law, however, requires just such clarity. Whatever distinction of private and public may separate the realm of corporate law from federal, mandatory, and public securities law, it is not sufficiently absolute to support such a categorical preclusion.

The same is true of the attempt to differentiate corporate law from securities law, as the regulation of substance versus process. In this spirit, Judge Easterbrook has described federal proxy rules as regulating process, in contrast with state corporate law's substantive rules of governance.[52] The distinction of substance from *disclosure* is simply a particular iteration of this contrast between substance and process.[53]

As in the case of the public-private distinction, it cannot be disputed that federal regulation of business organizations has been primarily oriented to procedural requirements. By contrast, state law offers the lion's share of substantive rules of corporate governance, even if only in enabling form. As Judge Easterbrook himself acknowledges, however, significant ambiguity attends the substance-process distinction in numerous areas.[54] The case of the proxy rules is instructive. While facially directed to questions of process, the federal rules go, for practical

51. *See id.* at 608-09; *see also* Karmel, *supra* note 36, at 83 n.10 (enumerating long series of federal legislative interventions in corporate governance).

52. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 503 (7th Cir. 1989).

53. *See* P.C. Berg, *The Limits of SEC Authority Under Section 14(a) of the Exchange Act*, 17 J. CORP. L. 311, 314 (1992).

54. *See Amanda Acquisition*, 877 F.2d at 503-04.

purposes, to the heart of a corporation's internal affairs.[55] One might similarly ask whether Sarbanes-Oxley's regulation of audit committee membership and its executive certification requirement are themselves directed to "process"—as might arguably seem on their face—or to the substance of corporate governance.

Laying a *doctrinal* foundation for a "federalization" critique of the Sarbanes-Oxley Act, then, is not easy. Neither public-private nor process-substance distinctions between federal law and state law offer an impermeable barrier between the two. Each indisputably captures the general corpus of each body of law, yet also leaves room for federal intervention—even if only selective—into the private, substantive realm of corporate governance. Neither distinction, in sum, establishes a constraint against every possible federal regulation of corporate law.

Beyond doctrine, the rhetoric of "federalization" can alternatively—and reasonably—be inferred to rest on some claim of federalism. Federalism claims assert a variety of rationales for the greater legitimacy and wisdom of local versus national authority.[56] Closest to "originalist" visions of federalism, local authorities are most likely to appreciate and execute the will of local populations, advancing the ends of liberalism. Following directly from the latter, federalism offers an efficient diversity of policy choice. Pareto-preferred policies can be implemented in particular locales, avoiding the application of undesirably homogenized rules across jurisdictions.

Critics of Sarbanes-Oxley for its "federalization" of corporate law might be read to assert similar arguments, in this case favoring state regulation of corporate governance.[57] The subjects of regulation in corporate law, as well as the substantive ends sought, naturally present a somewhat more ambiguous case for these more historical arguments for federalism. Even if some analogy can be made, however, two stumbling blocks present themselves.

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55. *See* Roe, *supra* note 41, at 611.

56. *See, e.g.*, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. (forthcoming 2006) (manuscript at 31-42, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=734644.

57. *See, e.g.*, Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REG., Spring 2003, at 26, 27-28.

To begin with, arguments for local autonomy and policy diversity do not, on their own, distinguish between the existing corpus of federal law and state law applicable to business associations. Absent some such line, however, the federalism argument would seem to prove more than the median Sarbanes-Oxley critic is willing to acknowledge.[58] If federalism dictates local rules of corporate governance to encourage local autonomy and to facilitate desirable variation, federal rules should fail more generally. If federalism claims undermine Sarbanes-Oxley's interventions into corporate law, they would seem to condemn federal securities law as well. Taken to their logical, and relatively proximate, conclusion, federalism arguments against Sarbanes-Oxley favor the shift of both corporate and securities regulation to the states. This may be for the best. As a policy prescription, however, it constitutes a more radical deviation from the status quo than Sarbanes-Oxley.[59]

More importantly, the nature of state corporate law undermines any federalism claim of the above variety. While corporate law is defined by individual states, both the theory of state competition in corporate law and the empirical reality thereof run counter to arguments for local autonomy and policy diversity. State competition for corporate charters, at heart, rests on legislative capacity for the rapid incorporation of efficient innovations undertaken by competing states. As this impliedly suggests, the essential premise of corporate law is not that state corporate rules will diverge to capture particularized morays—whether geographic or substantive. Rather, the

58. Among the exceptions are Roberta Romano. *See, e.g.*, Romano, *supra* note 6, at 1593 ("Moreover, a persuasive case can be made that the benefits of the federal regulatory regime [of the 1933 and 1934 Acts] have not been worth the cost.").

59. Most critics of Sarbanes-Oxley's federalization of corporate law might thus be seen to want their cake and eat it too. Unless they are willing to throw the securities law baby out with the Sarbanes-Oxley bathwater, however, the above federalism arguments against Sarbanes-Oxley fall short. Concurring with Roberta Romano, I believe that coherence demands something more. *See* Romano, *supra* note 20, at 40-41 (suggesting commentators are seeking "a way out" of the choice between a race to the top and a race to the bottom, given that strong evidence of the former creates "a need to reexamine the foundations of the federal government's role in securities regulation, as the object of regulation is the same").

operative premise of the relevant race—regardless of whether it runs to the top or to the bottom—is a pattern of convergence. This is the expected result, rather than the accommodation of local norms of corporate governance, whatever they might be.[60]

The empirical reality bears this out. Delaware enjoys significant market share in the incorporation business.[61] With defined exceptions, meanwhile, the law of competing jurisdictions tracks significant features of Delaware law.[62] Whether for better or worse, then, corporate law cannot be readily construed to serve the autonomy and diversity functions of federalism. There is, for the most part, a national corporate law in the United States; it is simply enacted by the state of Delaware.

Even if what might be posited as "pure" federalism arguments are ineffective challenges to the corporate governance provisions of Sarbanes-Oxley, however, second-order claims of federalism[63] remain. Critics of Sarbanes-Oxley thus indisputably intend to suggest the utility of experimentation by and competition among local regulators in their criticism of the Act's "federalization" of corporate law. State corporate law permits state regulators to pursue new legal technologies they deem likely to offer competitive advantage. If they are right, such innovations can be expected to take hold, both in the state of innovation and

60. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212-18 (1991); *see also* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 454 (2001).

61. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 555-56 (2002).

62. *See* William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 731-34 (1998) (observing high degree of uniformity among states on both core and non-core corporate charter terms, using multiple measures). It bears noting that Delaware is not always the innovator in state charter competition. Rather, other states are often the first-mover. Delaware has proven adept, however, at identifying and incorporating desirable innovations of its competitors. *See id.* at 741-42.

63. Federalism arguments premised on local experimentation and inter-jurisdictional competition thus were not at the heart of the *Federalist Papers* and other early American analyses of federalism. Among other reasons, this can be traced back to the impracticability of geographic mobility in the Eighteenth Century American colonies.

among its competitors. If undesirable, they can promptly be discarded. Even if flawed rules persist, they do minimum harm. Universally applicable federal rules, by contrast, stifle experimentation and innovation—the hallmarks of an efficient market.[64]

It is not clear, however, that such experimentation and competition are as vibrant as theory would have it. Michael Abramowicz posits externalities arising from corporate law innovation to lead to a "crawl to the top."[65] Marcel Kahan and Ehud Kamar identify barriers to entry and aspects of the political economy of charter competition as constraints on active competition.[66] Others concur.[67]

Even if such competition (and the experimentation behind it) is active, however, its presence or absence is not inherently a question of federal versus state law. Rather, its necessary prerequisite is access to multiple regulating jurisdictions. Where corporations may elect to be governed by any one of a multiplicity of regulatory authorities, the window opens for experimentation and competition. Among multiple competing jurisdictions, a given jurisdiction's innovation—altered rules for electronic proxies, for example—will be subject to demand and price feedback.

What allows competition in corporate law to be conceived as a "federal" question, thus, is not the adoption of relevant rules by national versus local authorities. Rather, it is the traditionally mandatory nature of rules adopted under federal law, and the enabling nature of state corporate law. Were federal rules of corporate law enabling, federal law would be largely unobjectionable.[68] Likewise, if

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64. *See* Carney, *supra* note 62, at 734-55; *see also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

65. *See* Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 YALE J. ON REG. 139 (2003).

66. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

67. *See* Lucian Bebchuk, Alma Cohen, & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002). *But see* Romano, *supra* note 20.

68. My slight caveat acknowledges that federal default rules might have a disproportionately strong focal effect—and hence coordinative power—as compared with state default rules. *Cf.* THOMAS C. SCHELLING, THE STRATEGY OF

state rules were *effectively* mandatory, Sarbanes-Oxley would at least raise far milder objections.

To be more explicit, the critics of Sarbanes-Oxley's "federalization" would likely object no less forcefully to unwaivable and unavoidable *state* law. Imagine, thus, if the state of California were to transform its corporate default rules into mandatory rules, but were also to give those rules bite. Specifically, what if it were to mandate local incorporation by all entities for whom the state is the primary, or perhaps merely a significant, place of business? Less invasively, but no less aggressively, it might impose certain minimum rules of corporate governance on all entities doing business in the state. It does not take much imagination to conceive the likely response of those critical of Sarbanes-Oxley's "federalization" of corporate law. It would, I wager, be identical to their reaction to Sarbanes-Oxley.[69]

It becomes apparent, then, that the critique of Sarbanes-Oxley's "federalization" of corporate law is only incidentally a question of federal authority. Critics of Sarbanes-Oxley have no greater affection for *state* outreach statutes than for *federal* rules of corporate law. The trouble, this suggests, is not jurisdictional. Rather, I would posit, it is regulatory.

Critics of the Sarbanes-Oxley Act's "federalization" of corporate law undoubtedly do bewail the loss of experimentation and competition it engenders. The sacrificed result of that competition, however, is not efficient regulation, at least as regulation is ordinarily conceived; rather, it is a species of deregulation. Sarbanes-Oxley's "federalization" is questioned not because it gets the rules wrong, in this view, but because it imposes rules.

On its face, the rhetoric of "federalization" might appear to offer a jurisdictional objection to Sarbanes-Oxley. State rules, it suggests, are more efficient than federal

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CONFLICT 54-55 (2d ed. 1980); Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 245-55 (2004).

69. In fact, the above scenario need not be imagined. California's unusually broad outreach statute, in Section 2115 of its Corporations Code, CAL. CORP. CODE § 2115 (West 2001), imposes an array of the state's corporate governance rules on corporations primarily doing business in the state. Advocates of charter competition, unsurprisingly, find Section 2115 abhorrent.

rules. The parallel assertion of a choice between "default" rules and "mandatory" rules is of similar effect. Yet such language obscures more than it reveals. A preference for default rules is not a preference for more efficient rules, but a preference for market control. Default rules, in this view, are not "rules" at all.[70]

Of course, the desired market is a "regulatory" market. But a market in state corporate law is still a market. The motivating force behind regulatory design in a world of default rules, negotiated via regulatory competition, is not (even asserted) public interest, one would suggest, but private incentive.[71] If a given default rule comports with private preferences, it survives market competition; if not, it is waived. To similar effect, if a state's corporate law regime (including both its default rules and its "trivial" mandatory rules) advances private interests, it is embraced via incorporation; if not, it is abandoned.[72]

This is not to suggest that state corporate law, comprised of default rules and subject to interstate competition, amounts to nothing more than a contract law regime. Corporate entities do not literally write their own ticket. Minimally, common law fiduciary duties offer a layer of extra-contractual constraints on corporate governance.[73] More importantly, the regulatory preferences of corporate entities are codified through political mechanisms,

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70. The handful of mandatory rules, meanwhile, are "trivial." *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).

71. I do not mean, at least for the moment, to offer any normative critique of this result. The interplay of private incentives, absent externalities or other market failures, may effectively maximize social welfare. Regardless of the end result, however, the dynamic at work cannot be equated with any conventional conception of regulation.

72. It might be objected that it is now my argument that proves too much; if the above arguments hold true, it is not regulatory competition in corporate law that is less "regulation" than "market," but all regulatory competition. I would not necessarily dispute as much. On the other hand, the relative ease of reincorporation, compared with other opportunities to "walk with one's feet," as well as the liquid securities markets and resulting ease of pricing regulatory choices in corporate governance, may arguably heighten the strength of competition, and hence the market dynamic, in corporate law versus other regulatory fields.

73. Some, of course, conceive even the body of common law—and its fiduciary duties in particular—as an über-default rule of sorts.

necessarily introducing some "imperfection" into the market of corporate law. Given the ultimate grounding of the process in private incentives, however, the theory of corporate law does not stray all that far from a contract regime.[74] Although few scholars have been prepared to put forward a normative claim for such reductionism, the underlying *theory* of corporate law necessarily assumes it.[75]

In this view, the critique of Sarbanes-Oxley for its "federalization" of corporate law is not about federal versus state regulation, but about the imposition of public regulation, where private incentives have heretofore played out in a market dynamic. At the extreme, it is not federal law to which critics of the Act's "federalization" object; it is law—or at least law in a command-and-control, regulatory sense. Such an argument is rarely articulated by critics of Sarbanes-Oxley, most of whom would prefer a less forceful stance.[76] Yet criticism of Sarbanes-Oxley's "federalization" of corporate law ultimately must either rest on a generalized claim of the efficiency of a market dynamic or mean nothing at all.

Preference for a vague critique of "federalization" over a broad condemnation of regulation is hardly surprising, of course, given the likely greater resonance of an implied defense of doctrinal consistency and coherence, of local autonomy and diversity, and of competition—desirable virtues one and all. By contrast, if Sarbanes-Oxley is not a case of "federalization," but merely of "regulation," criticisms of the Act simply echo a longstanding debate, in innumerable contexts, regarding the need for public

74. *See* Ribstein, *supra* note 3, at 48; Romano, *supra* note 20, at 3 (characterizing competitive regulatory regime as "the working of a market"); *cf.* Bayless Manning, *Shareholders Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962); Roe, *supra* note 41, at 594 (describing regime as "something akin to organized private lawmaking among the corporate players"). Let me emphasize that the assessment I put forward need not be equated with a race to the bottom. Even if state corporate law were no more than contract law, some general confidence in the efficiency of free contract might support expectations of a race to the top. That state competition over corporate default rules reduces to a market dynamic thus says nothing about whether that market is efficient or inefficient.

75. Henry Manne, perhaps unsurprisingly, is among the exceptions. *See* Henry G. Manne, *A Free Market Model of a Large Corporation System*, 52 EMORY L.J. 1381 (2003).

76. *See supra* note 59.

intervention in private markets. I would argue, however, that Sarbanes-Oxley's rules of corporate governance are properly understood as no more, and no less. If I am right, talk of a "federalization" of corporate law has no place. Instead, placing criticisms of Sarbanes-Oxley in the best light possible, one might posit its interventions as a case of "nationalization."

III. IN PRAISE OF NATIONALIZATION

What makes the seemingly jurisdictional critique of Sarbanes-Oxley's "federalization" of corporate law an issue of "nationalization"? At first glance, this conception may seem no better suited to critics' operative concerns with the Act. *The Oxford English Dictionary* thus defines nationalization, *inter alia*, as "the action of bringing land, property, industries, etc., under the control of the nation."[77]

Construing the concept in only slightly broader terms, however, one might conceive of nationalization as the assertion of public control in circumstances where private controls were theretofore dominant. Such assertions of control will conventionally involve state claims of ownership, which naturally are inapposite here. Rather, I posit a "nationalization" of corporate regulation, with enabling, market-driven constraints displaced by mandatory, state-defined rules. This, I believe, is what critics of Sarbanes-Oxley truly condemn. Though couched within a rubric of "federalization," it is such "nationalization" that motivates their concerns.[78]

The admittedly unusual construction of Sarbanes-Oxley's corporate governance mandates as incidents of "nationalization" may also be useful in framing debates over the Act within the political economy that is actually at work.[79] The status quo before Sarbanes-Oxley was not a

77. 7 THE OXFORD ENGLISH DICTIONARY 32 (1933).

78. Alternative characterizations might also be imagined. "Legalization" or "regulation," for example, capture the pattern at work. Likewise, the "imposition" or "introduction" of "law" or "regulation." None of the foregoing, however, is significantly less ambiguous than "nationalization." Meanwhile, they resonate less well with other usages in the corporate and securities law literature, which I outline above.

79. *Cf.* Westbrook, *supra* note 20, at 126 ("[C]orporation law scholarship over the last few generations has lacked an adequate political economy.").

regime of state regulation of corporate governance, at least in any conventional sense. Rather, corporate law was defined by a pattern of regulatory competition. Within this competition, meanwhile, the fight was not between distinct bodies of mandatory law, but alternative menus of default rules. Again, therefore, the true implication of Sarbanes-Oxley—obscured by the rhetoric of "federalization"—is not the displacement of state rules with federal rules, but the imposition of regulation on a relatively *de*-regulated market—a species of nationalization.[80]

That Sarbanes-Oxley's imposition of federal rules of corporate law constitutes a case of nationalization is also in line with the notion of corporate law as a "product."[81] As posited by Roberta Romano, modern corporate law can be fairly understood as a product, the quality of which is likely to be advanced by competition among suppliers—various state legislatures. The welfare of relevant consumers—shareholders and managers—is improved as a result.[82]

If corporate law is a product of sorts, however, its production may naturally be subject to nationalization. Like the production of any other technology, erstwhile private production can selectively—or comprehensively, for that matter—be brought into public hands. Minimally, public regulation of private production—whether of law or widgets—may be warranted where public interests are at stake, and in danger. Whether because of externalities or other barriers to efficiency, few would dispute at least the possibility of public intervention in private production. Yet that is the very nature of Sarbanes-Oxley.

This naturally leads to a converse virtue of the characterization of Sarbanes-Oxley's corporate governance provisions as a form of nationalization. A conception of the critique of Sarbanes-Oxley as an argument against nationalization jibes well with the preference of many of

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80. As acknowledged above, the status quo obviously amounts to something more than a pure market, given the intervening medium of legislative action. Furthermore, common law fiduciary duties overlay the contractual dynamic at work. *See supra* notes 73-75 and accompanying text.

81. *See* Romano, *supra* note 64.

82. *See* Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 539 (2005).

Sarbanes-Oxley's critics for a "privatization" of securities law.[83] Again, preeminent among these scholars has been Roberta Romano, who has argued forcefully for the introduction of regulatory competition to securities law, to parallel the charter competition behind corporate law.

Under the rubric of "issuer choice," such a regime would permit corporations to elect the body of securities law applicable to their issuances.[84] Echoing arguments in favor of enabling corporate law rules and state competition for incorporations, Romano and others have posited that such a "privatization" of securities law will induce its own race to the top, a virtuous cycle in which efficient levels of disclosure will be achieved.[85] For our purposes, such a privatization of securities law is readily understood as the perfect converse to Sarbanes-Oxley's nationalization of corporate law. The objections of Romano and others to Sarbanes-Oxley, thus, are the perfect corollary to their advocacy of issuer choice.

In the balance of privatization and nationalization, however, the discourse of recent years has been dominated by the prospects of privatization. In 1998, Romano developed the terms of such a privatization of securities law.[86] Contemporaneously, Stephen Choi and Andrew Guzman offered their own, slightly distinct proposal for a regime of issuer choice.[87] In the ensuing years, debates have raged between advocates and opponents of issuer choice.[88]

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83. As used in this context, such "privatization" arises from the opportunity for issuer choice in the selection of governing securities rules, akin to that offered in the selection of a firm's place of incorporation.

84. *See* Tung, *supra* note 82, at 529-30.

85. *See* Romano, *supra* note 42.

86. *See id.*

87. *See* Stephen Choi & Andrew Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998). In fact, Choi and Guzman first broached this possibility in an earlier piece. *See* Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 231 (1996).

88. For criticisms of issuer choice, see, for example, James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1229-37 (1999); Merritt B. Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQUIRIES L. 613 (2001). A slightly removed critique is offered by Fred Tung. *See* Tung, *supra* note 82 (challenging applicability of issuer choice to transnational securities regulation); *see also* Frederick Tung, *From Monopolists to Markets?: A Political*

In the meantime, other means for the privatization of securities law have also been pressed. Paul Mahoney has posited that securities regulation should be delegated—or returned, to be more precise—to the stock exchanges.[89] Kim Krawiec, meanwhile, has argued that the regulation of "outsider trading" should be left to private litigation.[90]

Beyond such scholarly advocacy of privatization, at least implicit examples of privatization can also be identified. Within the securities regulation regime, for example, the differential treatment of certain types of issuances—including those in amounts less than $5 million and Rule 144A securities—offers a dimension of choice.[91] The availability of various private causes of action pertaining to duties under the federal securities laws, including their antifraud provisions, might also be noted.[92] To similar effect is the ability to arbitrate securities law disputes, a hallmark of private law.[93] The most significant aspect of privatized securities law, however, may be the present-day availability of some degree of issuer choice. As suggested by Amir Licht, stock exchange mobility and resulting competition have indirectly engendered such a dynamic of choice: Issuers today enjoy the opportunity to list their stock under a variety of competing regulatory regimes.[94]

Yet the converse pattern of nationalization remains part of the political economy of corporate regulation as well. While less prominent, and perhaps less in the nature of a trend, these incidents have also been important. Mark Roe identifies several such cases, some explicit and others more subtle.[95] These include the SEC's adoption of its all-holders rule, its indirect elimination of dual-class recapitalizations,

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Economy of Issuer Choice in International Securities Regulation, 2002 WIS. L. REV. 1363.

89. *See* Paul G. Mahoney, *The Exchange As Regulator*, 83 VA. L. REV. 1453 (1997).

90. *See* Kimberly D. Krawiec, *Privatizing "Outsider Trading"*, 41 VA. J. INT'L L. 693 (2001).

91. *See* John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT'L L. 531, 544-46 (2001).

92. *See* Licht, *supra* note 44, at 613.

93. *See id.* at 613-14.

94. *See generally id.*

95. *See* Roe, *supra* note 41, at 619-22.

and its imposition of proxy statement access for mere "precatory" proposals by shareholders.

Of course, the Sarbanes-Oxley Act's corporate governance provisions constitute a further data point along this line. Rather than an aberration, thus, Sarbanes-Oxley is simply the latest incidence of some nationalization of corporate law. Rather than unprecedented, it is one among various examples of selective nationalization of corporate law, not unlike the incidents of securities law privatization enumerated above.

The real question of Sarbanes-Oxley, then, is not the wisdom of some radical departure from the existing regulatory regime governing business associations, as critics of the legislation would have one believe. The Sarbanes-Oxley Act simply adds its piece to an already mixed regime of public mandatory rules and private enabling rules for corporate governance. The real inquiry is therefore whether the existing blend of market and regulatory controls of corporate governance should be abandoned. More affirmatively, perhaps, what might be the benefits of such a mix?

IV. A ROLE FOR MIXED GOVERNANCE IN CORPORATE LAW?

If criticism of the Sarbanes-Oxley Act's "federalization" of corporate law comes down to a preference for a market-driven regime of corporate governance, an aspiration indisputably threatened by the Act's "nationalization" of certain rules of corporate governance, what is the validity of this critique? As noted at the outset, there are undoubtedly legitimate criticisms of Sarbanes-Oxley's corporate governance provisions on the merits. Aspects of its procedural design might also be challenged. Generalized critiques of any and all federal interventions in corporate law, by contrast, appear more difficult to sustain. Neither doctrinal distinctions between corporate law and securities law, nor the asserted benefits of federalism, nor the expected promise of experimentation and competition, offer a categorical bar against any and all incidents of nationalization in corporate law. Going beyond the shortcomings of the arguments *against* Sarbanes-Oxley's selective nationalization, however, I hope to conclude by suggesting the *affirmative* arguments in favor of such intervention and a resulting mix of federal and state rules of corporate governance.

One might begin with the status quo. That the regulatory dynamic at work in corporate law is characterized by a largely stable regime of "mixed governance" might arguably be seen as some evidence of its wisdom. A mix of rules—public, mandatory, and federal, as well as private, enabling, and state—thus characterize modern corporate law. Lending dynamism to this mix, regulatory competition, both among state legislatures and between federal and state regulators, is pervasive. Finally, judicial policing of this competition with reference to congressional intent, in order to minimize the abuse of federal power, helps to complete the picture.

Within this status quo, forces of privatization and nationalization balance one another in the regulation of business associations. In political economy generally, this pattern has been styled a "third way."[96] Within this paradigm, a mix of public and is seen to foster efficient growth. Some balance between the poles of privatization and nationalization, then, might be as suited to corporate governance as it is to the economy generally.

Other arguments also favor allowance for some selective nationalization of corporate law, and a resulting blend of federal and state rules of corporate governance. One might begin with the mixed nature of the corporation itself. As suggested above, notwithstanding its recent conception as private and contractual, early notions of the corporation saw it as public in nature. Recently, moreover, scholars have begun to challenge the private paradigm in corporate law. Communitarian conceptions of the firm have received growing attention.[97] Attention to the external impacts of hostile takeovers is in a similar spirit.[98] More generally, the necessary role of the state behind any nexus

96. *See, e.g.*, Stephen Turner, *The Third Way*, SOC'Y, Jan.-Feb. 2005, at 10.

97. *See* PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, L. & CONTEMP. PROBS., Summer 1999, at 9.

98. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 256-61.

of contracts is impossible to dispute.[99] Finally, Bert Westbrook's "reimagination" of the public character of corporate governance, grounded in the essential social utility of capitalist mechanisms of public ordering, also deserves note.[100]

External to the corporation, the wide distribution of share ownership in recent years also favors some public dimension of corporate law. Through the rise of defined contribution retirement plans and mutual funds generally, equity ownership in the United States has grown dramatically in recent years. By the start of 2002, nearly half of U.S. households owned equities, based on a rise of more than seven percent over the *bear* market years of 1999 to 2001.[101] Given as much, corporate failures, and even inefficiencies, have direct and potentially dramatic public implications.

Growing evidence of a correlation between strong capital markets and economic growth may also favor a federal, mandatory, and public dimension of corporate regulation.[102] Well-functioning securities markets may offer a boost of as much as 1.6% in annual per capita GDP growth.[103] More to the point, optimal regulatory regimes are likewise correlated with accelerated growth.[104] If optimal corporate governance is a component of economic development, of course, the argument for some public dimension in its regulation grows more compelling.

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99. *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 443 (1989). Other criticism of the contractarian conception of the firm is cited in Westbrook, *supra* note 20, at 108 n.284.

100. *See* Westbrook, *supra* note 20, at 118.

101. *See* Press Release, Securities Industry Association, Half of American Households Own Equities (Sept. 27, 2002), http://www.sia.com/press/2002_press_releases/html/pr_equity_ownership.html.

102. *See* Ross Levine, *Finance and Growth: Theory and Evidence* (NBER Working Paper No. 10766, 2004), *available at* http://www.nber.org/papers/w10766.pdf.

103. *See* Ross Levine & Sara Zervos, *Stock Market Development and Long-Run Growth*, 10 WORLD BANK ECON. REV. 323 (1996).

104. *See* Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

Finally, the potential for market failure in certain aspects of corporate governance and the securities markets would also favor a place for limited public regulation of business associations. In recent years, scholars have pointed to a variety of potential inefficiencies. The tendency of network externalities to constrain efficient innovation and variation has been the subject of wide attention.[105] Patterns of inertia may have similar effects.[106] Finally, the recurrent pattern of market breaks in the securities markets has also been highlighted as evidence of some informational inefficiency.[107] If the markets functioned as advertised, such breaks should not occur; with growing frequency, however, they do.

Beyond this familiar litany of arguments for selective federal intervention in corporate law, I would propose to go a step further, to suggest the affirmative benefits of "mixed governance" in corporate law. Sarbanes-Oxley and similar federal rules of corporate governance, I would posit, create a distinct jurisdictional pattern in corporate law. Contrary to the clean jurisdictional lines falsely promised by the doctrinal separation of *federal* securities law from *state* corporate law, Sarbanes-Oxley creates a regime of "jurisdictional redundancy." The particular third way between public and private in corporate law (and perhaps in securities regulation as well) may thus depend not on a tidy segregation of jurisdiction, but on its duplication.

Corporate governance, within such a scheme, would simultaneously be subject to ordinary mandatory regulation by federal authorities, and market-driven enabling regulation by state authorities. The respective jurisdictional role of the federal and the state government—of regulation versus the market—would cease to be determinate in any familiar sense. Rather, the regulation of business associations would play out in an indeterminate climate of regula-

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105. *See* Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277 (2003); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995).

106. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

107. *See* Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741 (2000).

tory competition and coordination, of delegation, and of presumptive deference to the market.

Some twenty-five years ago, Robert Cover and Alexander Aleinikoff pointed to the overlapping jurisdiction of state criminal courts and federal habeas courts as driving a pattern of "dialectical federalism."[108] In their view, the redundant jurisdiction of these courts, and the resulting need to engage one another, offered the promise of a beneficial evolution in norms of constitutional criminal procedure. More broadly, Robert Schapiro describes a pattern of "interactive federalism" as a potential substitute for traditional dualism in the allocation of federal and state jurisdiction.[109] Rather than seeking to draw clear lines of federal and state jurisdiction—a failed project—Schapiro counsels our embrace of "polyphonic" patterns of interaction to advance the goals of federalism. In this scheme, federal and state courts enjoy overlapping jurisdiction, necessitating their active engagement of one another in the progressive resolution of disputes.

I have previously considered the potential for a similar dynamic of "dialectical review" in the interaction of international tribunals and U.S. courts under the North American Free Trade Agreement.[110] By virtue of its design, Chapter 11 of the Agreement forces domestic courts and investor-state dispute tribunals to engage one another on questions governed by both domestic law and the customary law norms enshrined in the Agreement. Jurisdictional avoidance is impossible, for the simple reason that the relevant adjudicators' jurisdiction overlaps.

Yet this is just the point: such overlap may have significant utility. Most obviously, it may help to ensure that issues are not overlooked, and that process failures do not consequently interfere with optimal regulation (or deregulation, for that matter). Such fail-safe mechanisms, however, represent only part of the utility of redundant jurisdictional authority. In the regulation of business associations, thus, the regulatory infrastructure may

108. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

109. *See* Schapiro, *supra* note 56.

110. *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

further favor overlap, in light of state authorities' limited ability to impose even efficient mandatory rules. Given charter competition among the states, such rules may be difficult to sustain, at least in the short-term. The imposition of mandatory rules in corporate law may consequently *require* a regime of some jurisdictional redundancy.

The most significant role for redundant regulatory jurisdiction, however, may be its capacity to encourage desirable innovation. In the interaction of distinct and independent regulatory authorities, with distinct and independent approaches, conceptions, and constituencies, greater potential for efficient change might be predicted.[111] The conventional bounding of jurisdictional lines is necessarily effective in minimizing conflict, but is also likely to favor stasis, for the very same reason. External shocks may thus be an essential source of systemic change. More temperately, institutional designs that necessitate interaction with distinctly situated actors, motivated by distinct incentives, might be expected to encourage efficient innovation.

In corporate law, the interaction between federal and state regulators might arguably be conceived in some such fashion. Mark Roe has documented a pattern of state responsiveness to federal pressure in corporate governance.[112] Yet federal regulation may also respond to state

111. *See id.* at 2063-86.

112. *See generally* Roe, *supra* note 41; *see also* Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 644-46 (2004) (describing evidence of jurisprudential shift in Delaware decisions following Sarbanes-Oxley); Karmel, *supra* note 36, at 137-38 (referencing state judicial response to Sarbanes-Oxley, and suggesting several areas in which federal and state regulatory authorities might compete to offer further reform, following the adoption of Sarbanes-Oxley). The pattern of jurisdictional redundancy I posit, of course, speaks directly to the paradigm of federal domination outlined by Mark Roe. The model offered above might thus be conceived as a normative theory of the federal-state interaction studied by Roe. I do not dispute the *potential* for the hierarchical pattern of engagement Roe describes, as distinct from the *dialectical* engagement I outline. I am simply less sure, as I will suggest, that the pattern of congressional intervention to date can be fairly understood in quite so heavy-handed a light. By contrast with Roe, I would conceive state rules of corporate law as arising in the *shadow* of federal law, rather than as a *product* of it.

interests.[113] So long as federal authority is not unbounded, it too must respond to its regulatory counterpart. Cover and Aleinikoff found the inability of federal habeas courts to mandate application of their constitutional interpretations in state criminal trials to be the source of the dialectical engagement they observe.[114] To similar effect is the interaction of international tribunals and domestic courts under Chapter 11 of the North American Free Trade Agreement.[115] Where neither party can impose its will on the other, it must necessarily engage with the other, and with the latter's perspectives and positions, in order to effectuate its will.

Can this be said of the dynamic at work in the regulation of corporate governance? As noted above, critics of Sarbanes-Oxley have highlighted the aggressive jurisdiction-grabbing to which the SEC has been prone. If this criticism is on point, jurisdictional redundancy in corporate law may be a fleeting phenomenon; shared jurisdiction may only be as expansive as the SEC's limited willingness to share.

Whatever the avariciousness of the SEC, however, I would question the painting of Congress with an identical brush. While a harsh public choice accounting of the

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113. *Cf.* Romano, *supra* note 20, at 34-36 (suggesting back-and-forth pattern of interaction between federal and state regulators, regarding going-private transactions). Several scholars have explored the benefits of some shared federal and state role in corporate governance or securities law, though not within the particular frame of jurisdictional redundancy I posit. *See, e.g.*, Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279 (2004) (offering public choice argument for "dual enforcement" of securities law); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2005) (exploring utility of overlapping jurisdiction in securities enforcement); Jones, *supra* note 112. Bob Thompson's exploration of "collaborative" regulation of corporate governance deserves particular note, for its emphasis on the relationship of federal regulation and the body of private rules imposed by self-regulatory organizations, including the New York Stock Exchange and NASDAQ. *See* Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation*, 38 WAKE FOREST L. REV. 961 (2003). The latter have not been an emphasis herein, given my primary interest to explore the relationship of federal and state constraints on corporate governance, but clearly warrant attention in any comprehensive analysis of mixed governance in corporate law.

114. *See* Cover & Aleinikoff, *supra* note 108, at 1049, 1052-53.

115. *See* Ahdieh, *supra* note 110, at 2101-08.

regulatory history of the SEC may be well-warranted, it is not clear that Congress can be accused of a similar willingness to broadly preempt state legislative authority over corporate governance. Whatever the breadth of Sarbanes-Oxley's intervention in corporate law, it surely cannot be construed as a general preemption of state authority. No one would argue that corporate law is now federal law. Nor has Congress generally shown itself prone to dramatic expansions of federal law in the regulation of business associations.[116] However forcefully some have criticized the 1933 Securities Act and the 1934 Securities Exchange Act's interventions in state law, we do well to recall that it is decrees of nearly seventy-five years ago that are at issue in such debates.

Of course, even a deferential stance of Congress toward state corporate law would mean little for jurisdictional redundancy, if the SEC's efforts at preemption were not subject to check. Yet here, the courts have been reasonably effective. Over a long line of cases, the judiciary has shown itself ready to police the SEC's adherence to its legislative mandates.[117] Most importantly, the courts have subjected SEC rules to an inquiry into congressional intent, seeking evidence of a clear legislative mandate for SEC regulations preempting state corporate law. Given as much, overlapping federal and state jurisdiction in corporate law need not—of necessity—collapse into federal jurisdiction.[118]

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116. Among other explanations, this may be rooted in affirmative political checks on broad congressional intervention in corporate law, *see* Romano, *supra* note 20, at 39-40, as well as political inertia at the congressional level.

117. *See* Licht, *supra* note 44, at 608 (citing attempts by SEC to regulate corporate law that were rejected on judicial review); Romano, *supra* note 6, at 1523; *see also* Karmel, *supra* note 36, at 84-86 (discussing cases in which judicial interventions in state corporate law have ultimately been curtailed). The disaggregation of federal authorities into their constituent parts, thus, may be important to an understanding of the general prospects of a preemption of broad swaths of corporate law.

118. On a further potential danger of jurisdictional redundancy, see, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, (SSRN, Working Paper no. 770305, 2005), *available at* http://ssrn.com/abstract=770305. In a similar spirit, Bill Buzbee has explored failures of the "regulatory commons." *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); *cf.* Jones, *supra* note 113, at 127-29 (exploring risks of "balkanization" of regulation in dual system). The prospects of regulatory avoidance, then, must be weighed against the potential utility of redundant jurisdiction.

More concretely, evidence of a dialectical dynamic between federal and state regulators of business associations is offered by occasions on which federal regulators have followed a state lead. In such cases, Congress and the SEC can be understood to have borrowed—even learned—from state regulatory authorities. Most broadly, the 1933 Securities Act, having drawn its terms from the corpus of existing state securities law, can be fairly conceived in this light. More recently, SEC regulation of mutual fund practices can indisputably be traced to the initial enforcement efforts of Eliot Spitzer, in his capacity as Attorney General of the State of New York. While the latter is, of course, distinct from the pattern explored herein, it is suggestive of the potential for a two-way regulatory street.[119]

Beyond the threat of federal power, a further rejoinder to my proposed model of shared federal and state jurisdiction over corporate governance might question its importance as a source of innovation. Such innovation, of course, is the very point of *state* authority over corporate law. It is by virtue of state competition, thus, that state legislatures have incentives to innovate and thereby develop optimal corporate law regimes. As Bill Carney and others have highlighted, moreover, the capacity of state corporate law for innovation is quite significant.[120] Federal regulation, by contrast, is not subject to similar competitive pressures and is consequently likely to be less prone to innovation.

I would not dispute the premise behind this argument; rather, I question whether the virtues of the existing system might not be further advanced with some limited room for federal intervention. With meaningful constraints on federal authority, thus, a dominant dynamic of competition—even between federal and state regulatory agents—is likely to persist. Some provision for vertical

119. The case of Spitzer and the SEC may suggest an entirely distinct way in which federal interventions in corporate law may be constrained in a regime of jurisdictional redundancy. Echoing the interaction of federal and state courts in habeas review of state criminal convictions, the focus of Cover and Aleinikoff's model of dialectical federalism, state regulators may go a long way to constrain federal regulation, simply through their capacity to make a nuisance.

120. *See* Carney, *supra* note 62.

competition, moreover, might offer unique benefits. As noted above, this begins with a mixed regime's capacity to impose (and perhaps merely threaten) at least some mandatory regulation. Additionally, federal regulators are necessarily distinct in perspective, in specialization, in resources, and the like, by comparison with the state legislative bodies responsible for innovation in state corporate law.[121] If so, incorporation of vertical competition into a regime of horizontal competition might be expected to enhance the collective capacity for innovation in corporate law.[122]

It bears emphasizing that the pattern of jurisdictional redundancy I offer need not mean that the regulation of business associations—and of corporate governance particularly—is indiscriminately shared by federal and state regulators. Borrowing from the unsuccessful effort to distinguish sharply between a *process*-oriented federal securities law and a *substance*-oriented state corporate law, one might conceive of a generalized, if not unvarying, orientation of federal regulation to questions of form.[123] Notably, such a distinction might be seen to echo other recent federal interventions in areas of traditional state authority. The No Child Left Behind Act, for example, might be said to prescribe certain institutions in primary and secondary education, but not to mandate the mechanisms of their creation or the details of their operation.

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121. The failure of state corporate law to offer any immediate response to Enron and its successor scandals might be suggestive in this regard. While the aggressive federal intervention embodied in the Sarbanes-Oxley Act may well have discouraged state action, some part of that silence might also be traced to distinct perspectives and pressures disfavoring intervention at the state, versus federal, level. If so, then the opportunity for federal intervention is necessarily of value.

122. In discussing the utility of vertical competition as a supplement to horizontal competition, I should clarify that I do not mean to invoke a Canadian-style system of corporate law, in which the option of federal incorporation competes with provincial alternatives. While a regime of jurisdictional redundancy might include provision for federal incorporation, it need not. Rather, its core feature is a place for selective federal rules of corporate law, with general application.

123. The process-substance distinction thus might support some prudential emphasis on process, even if it cannot support an absolute constraint against any and all federal regulation of substantive corporate law.

Sarbanes-Oxley's corporate governance provisions might fairly be construed in such terms. The Act requires certification of financial statements, for example, but does not prescribe rules for the preparation and review of those statements. Similarly, it does not delve into the content of audits, but requires their preparation by disinterested auditors, selected by disinterested board members. Even allowing for a substantial degree of SEC rule-making, much of Sarbanes-Oxley's implementation will consequently be a product of private ordering. As such, the Act leaves significant room for private incentives to play out, within its specific requirements of form.[124]

Beyond judicial policing of federal interventions into corporate law to ensure congressional authorization, as well as a primary orientation of such interventions to matters of form, a further beneficial constraint might be borrowed from Roberta Romano. Even if only as a second-best alternative to repeal, Romano recommends the incorporation of sunset provisions into Sarbanes-Oxley's corporate governance provisions.[125] Given an appreciation of the desirable limits of mixed governance—the value of permitting *some* scope for jurisdictional redundancy, but also limiting that scope—the use of sunset provisions is attractive. Even beyond Sarbanes-Oxley, thus, one might imagine a generalized model in which mandatory interventions by federal authorities in corporate law, whether legislative or regulatory, would be subject to sunset review, renewal, or revocation.

As the several constraints offered above—judicial policing of federal interventions into corporate law, a presumptive orientation of such interventions to issues of process, and mandatory sunset review—collectively acknowledge, federal interventions in corporate governance are different in kind than state interventions. Because of their preemptive power, the costs of error, if not the risks as well, are necessarily greater. Rather than resolving these

124. *See* Brett H. McDonnell, *Sox Appeals*, 2004 MICH. ST. L. REV. 505, 506. From this perspective, Sarbanes-Oxley's prohibition on corporate loans to officers may be the most difficult of its corporate governance provisions to justify. For among the latter, it stands apart in seeming to go quite explicitly beyond form. Notably, in this vein, it has been the subject of particular criticism.

125. *See* Romano, *supra* note 6, at 1600-02.

difficulties with an absolute proscription against such intervention, however, a regime of shared jurisdiction with appropriate constraints offers a compromise position. Creating a balance of jurisdictional authority, it would permit neither unconstrained market authority, nor unbounded regulatory authority. A balance of this sort may best meet the needs of a complex corporate marketplace.

CONCLUSION

For all the talk of the Sarbanes-Oxley Act's "federalization" of corporate law, critics of the legislation on this ground do not speak to any inherent question of federal versus state power. Nor do they seek to preserve meaningfully distinct bodies of federal securities law and state corporate law. Even regulatory competition is not the point. Rather, it would seem, the real aspiration is to leave corporate governance to the asserted efficiencies of market-mediated private incentives, precluding the undesirable imposition of public regulation.

Once we understand as much, we can dispense with the rhetoric of "federalization" and take up the real issue at stake. Is some role for effective mandatory regulation, however limited and constrained, appropriate in corporate law? I offer a preliminary argument in favor of mixed governance, suggesting the utility of a regime of jurisdictional redundancy in fostering efficient innovation in corporate law. While susceptible to abuse, and consequently requiring effective constraint, selective federal regulation of corporate governance may offer a fruitful avenue of vertical competition, to supplement the horizontal competition at the heart of the present-day corporate law regime.